JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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COURT MARTIAL JURISDICTION.

Frank v. *Murray,* 248 Fed. 865.

When does one's connection with the army become such as to render him liable to court martial? It was held in this case that under the Selective Draft Act, one called into military service is from the date he was called subject to military law and to punishment as a deserter if he fails or refuses to obey the summons to join the army. The question came up on a habeas corpus proceeding. The court said: "There is no room for doubt that under the Selective Draft Act, and the Articles of War, the appellant having been drafted into the service of the United States, he became from the date of said draft, and certainly after acceptance and notice, subject to the laws and regulations governing the Regular Army, including the Articles of War."

ESPIONAGE ACT.

United States v. *Krafft,* 249 Fed. 919. *Inciting insubordinates, etc., in military forces.*

The Espionage Act, of June 15, 1917, provides, among other things, that "whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States" shall be guilty of crime.

The defendant was charged with a violation of this provision in that he did say to a certain corporal in the U. S. Army: "I can't see how the government can compel troops to go to France." "If it was up to me, I'd tell them to go to hell," etc. Held: Conviction sustained. It is not necessary for the government to prove that the words actually caused insubordination or disloyalty or mutiny. It is enough that they were spoken with that intent. The question of willful intent is one for the jury.

The jury were instructed that if the words were spoken in sudden anger or without deliberation, they should acquit. The verdict must be taken therefore as a finding that they were not so spoken. This defendant was a prominent man of affairs and spoke from a platform in a populous city to a large crowd. He thus spoke with deliberation and must be held to have intended the natural and probable consequence of his words.

EVIDENCE.

People v. *Reilly* (N. Y.), 120 N. E. 113. *Confession—Stipulation not to use evidence against accused.*

Defendant was one of a group of men in a drinking place in New York City. A controversy arose and growing out of this, Tynan, one of the group, was shot Defendant was convicted of assault in the second degree. On the same occasion, Bambrick, another of the party, shot and killed a policeman. He was

convicted of murder and later a petition for his pardon was presented. The district attorney in the attempt to secure further data for the governor, interviewed the defendant, Reilly, and pomised him that any statement he made would not be used against him. He thereupon made a long statement.

Held: (1) The statement was not a confession, because exculpatory in its nature. (2) A part of it is inconsistent with the statement made by him in the present trial, but the district attorney should not have been permitted to violate his stipulation with the defendant. It is often necessary to make such stipulations in order to get needed information, as it was in this case when investigating the Bambrick case. No principle of public policy is violated in making such agreements, and "it would be extremely detrimental," says the court, "to the administration of justice if it should be established that a district attorney need not keep with an accused person such an agreement as made in this case, and that such a rule ought not to be established unless compelled."

PHYSICIANS AND SURGEONS.

People v. *Hewson* (N. Y.), 120 N. E. 115. *Practice under assumed name.*

The defendant is a licensed dentist. More than twelve years before this case, he had purchased the business of another dentist named King and continued the business until 1916 under the name "King Dental Offices." To comply with the statute against practicing under a false or assumed name, a change then became necessary. He then ran advertisements in which he repeatedly used his own name, but added the words, "formerly King Dental Offices."

Held: This did not amount to practicing under an assumed name. He cannot be held for connecting the present with the past. Chase, J., concurring in the result, makes, however, the following statement: "In the advertisement in question the defendant placed his 'trade name' in very large type at the bottom thereof, so as to appear on a casual observation as the signature and subscription thereto. When he used his real name therein, he placed it in small type. By such and other devices the advertisement is calculated to deceive the public. If an action had been brought against the defendant for the penalty provided by the statute, and at a trial the jury had found, on the evidence before us, that the defendant by the advertisement so suppressed his true name and emphasized his trade-name that the public were likely to be misled thereby, a judgment upon verdict should, I believe, be upheld. I have no doubt that as a matter of fact the defendant intended, by the advertisement and the devices contained therein, to avoid the real purpose of the statute and continue the practice of dentistry under the trade-name substantially as theretofore conducted by him. I concur in the decision about to be made solely because the purpose of the defendant cannot be determined as a matter of law."

VERDICT.

People v. *Poole* (Ill.), 119 N. E. 916. *Age of accused.*

It is provided in the Reformatory Act, 310, that in all criminal cases tried by a jury in which the defendant is found guilty, the jury must also find by the verdict whether or not the defendant was between the ages of 10 and 21 years, and if he is found to be between those ages then to find as nearly as possible his exact age. Held, that the age of an adult need not be shown and

unless there is evidence in the record tending to show that the defendant is under 21 years of age it is not necessary that the jury find the defendant's age in their verdict.

HOMICIDE.

Conspiracy to commit crime—liability.

When two or more, in furtherance of a common design, enter upon the perpetration of a burglary, armed and prepared to kill if opposed, and while so engaged are discovered, and in the effort to escape one of the burglars shoots and kills one who is trying to arrest him, all are held equally guilty of the homicide, in the Nebraska case of *Romero* v. *State,* 164 N. W. 554, annotated in L. R. A. 1918B, 70, although one of them, who is not armed with a deadly weapon, escapes before the shooting, and such killing is not part of the prearranged plan.

It is a general rule that persons joining in an unlawful enterprise, or counseling or inciting the perpetration of an unlawful act, will be presumed to intend the use of whatever means may appear to be necessary to overcome any resistance to the successful carrying out of such enterprise, and each member thereof is liable for acts done by other members of the conspiracy in the furtherance of the common object, and each is liable for all results which are the natural and probable consequence thereof. Their absence at the time of the commission of the act complained of does not relieve them of responsibility therefor.

Where several men combine to invade a man's household and they go there armed with deadly weapons for the purpose of assaulting him, and in furtherance of this design, while all the confederates are near at hand, one of them gets into a difficulty with the common adversary and kills him, it is held in *Williams* v. *State,* 81 Ala. 1, 60 Am. Rep. 133, 1 So. 179, 7 Am. Crim. Rep. 443, that all are guilty of the murder.

The members of a conspiracy to carry out a criminal enterprise are held responsible in *Holmes* v. *State,* 6 Okla. Crim. Rep. 541, 119 Pac. 430, 120 Pac. 300, for the acts of the different members thereof until the object is fully accomplished. This responsibility is not terminated by the accomplishment of the common design of the conspiracy, but it extends to and includes collateral acts incident to and growing out of the common design; as, for example, where the common design was to rob another and the parties agreed that after the robbery they would return to a certain place and divide the booty obtained, each of them is guilty of the murder of the victim by one of them while committing the robbery, even though the others were not present.—From JOSEPH MATTHEW SULLIVAN, Boston, Massachusetts.

APPEAL.

People v. *Mooney,* Calif. 174 Pac. 325. *Setting aside judgment for fraud.*

Motion to set aside judgment and sentence on ground that verdict, order denying new trial, judgment, and sentence were procured through the willful nonfeasance and malfeasance and willful fraud of the district attorney, committed upon the superior court, jury, and defendant, whereby defendant was deprived of a fair and impartial trial, and which prevented a fair submission of the cause, was too general as a charge of fraud.

A judgment in a criminal case cannot be set aside for fraud, because it is predicated upon perjured testimony, or because material evidence is concealed or suppressed.

The duty of a district attorney does not differ in the trial of criminal actions from that of counsel in civil actions, and if he introduces perjured testimony, or suppresses material evidence, the injured party is without remedy, in so far as the judgment is concerned.

Talkington v. *State,* Okla. 175 Pac. 132. *Effect of accepting parole.*

Where a plaintiff in error accepts a parole pending the determination of his appeal, he thereby waives the right to have his appeal determined; and, when the attention of the court shall be called judicially to the fact that a parole has been granted and accepted, the appeal will be dismissed.

ARMY AND NAVY.

State v. *Burton,* R. I. 103 Atl. 962. *Obedience to superior military authority as a defense.*

A member of the United States Naval Reserve force driving a motor vehicle along a city street in the performance of an urgent duty to deliver a dispatch under instructions from his superior officer, is not in time of war amenable to Pub. Laws, 1916, c. 1354, sec. 17, regulating speed of motor vehicles: state laws being subordinate to exigencies of military operations by the federal government in time of war.

(See Yale Law Journ., p. 61, for a criticism of the case.)

ASSAULT AND BATTERY.

People v. *Bennett,* Calif. 173 Pac. 1004. *Pointing an unloaded weapon.*

The pointing of an unloaded gun at the prosecuting witness, accompanied by a threat, without any attempt to use it otherwise, is not an "assault with a deadly weapon," and cannot sustain a conviction for assault, for want of a present ability to commit a violent injury on the person threatened in the manner attempted.

CONSTITUTIONAL LAW.

Wamsley v. *People,* Colo. 173 Pac. 425. *Ex post facto law.*

Laws, 1911, p. 527, making failure to support an illegitimate child a felony, is not unconstitutional as ex post facto, though applied to cases of failure to support illegitimate children who were begotten before the statute became effective.

EVIDENCE.

State v. *McIver,* N. Car. 96 S. E. 902. *Evidence of action of bloodhounds.*

In criminal prosecution, evidence of the action of bloodhounds in trailing guilty party *held* admissible where evidence showed hounds were registered thoroughbreds, experienced in trailing human beings, and that the hounds, after being put on the trail, ran down road into accused's house and up to overalls accused confessed to having worn on day of crime.

FALSE PRETENSES.

State v. *Samaha,* New Jersey 104 Atl. 305. *Effect of sale on Sunday.*

In prosecution for obtaining money by false pretenses, it is no defense that, as the pretenses as to value of a stone were made and acted upon, and the sale made on Sunday, title to the stone and to the money paid therefor did not pass, because the false pretense, and not the contract, is the basis of the prosecution, and actual ownership is immaterial.

INDICTMENT.

State v. *Crouse,* Me. 104 Atl. 525. *Statutory offense.*

Indictment for statutory offense in addition to statutory words of general description must, in some cases, set forth such further statement of facts and circumstances as may be essential to identify the particular doing.

Indictment for violation of Rev. St., c. 121, secs. 1-3, punishing willful and malicious burning of a "building" of another, reading that defendant feloniously, willfully, and maliciously did burn a "building," the property of another, etc., was insufficient to inform defendant of accusation against her, as required by Const., art. 1, sec. 6; "building" comprising any edifice erected by man of natural materials."

JURY.

Brown v. *State,* Okla. 174 Pac. 1102. *Time when juror must be qualified.*

Where the record shows that one of the persons selected by the jury commissioners from the tax rolls of the county for service in the district court was a minor at the time of his selection in January, 1917, but reached the age of 21 years and became a qualified elector of the county before the time he was impaneled and sworn to try the cause, *held,* that the mere fact that at the time of his selection he was not qualified for jury service did not operate to deprive the defendant of a fair and impartial jury to try said cause, or deny to him the right of trial by jury, was waranteed by section 19, part 2, Constitution.

The provision in section 3690, Rev. Laws, 1910, that "no name of a person who does not possess the qualifications of an elector" shall be placed upon the jury list by the jury commissioners, is directory, and aimed to reduce to a minimum the likelihood of having served and summoned for jury service persons not qualified under the law. Where, by reason of inadvertence or mistake, the name of a person who is a taxpayer, but a minor, is selected and placed upon the jury list, the defendant may not raise the question that said juror was not lawfully selected for the first time after verdict has been rendered. Had said juror been a minor at the time the jury was impaneled and sworn to try the cause, a challenge for cause upon the grounds stated in the second subdivision of section 5857, Rev. Laws, 1910, should have been interposed as to him; otherwise, there is a lack of diligence to discover the disqualification.

LARCENY.

Calif. D. C. A. 174 Pac. 686. *Distinguished from embezzlement.*

Pen. Code, Sec. 508, providing that clerks, agents, or servants fraudulently appropriating property coming under their control or care by virtue of such

employment shall be guilty of embezzlement, does not apply to a mere caretaker, and his theft of the property is "larceny."

MANSLAUGHTER.

State v. *Hopkins,* S. Car. 96 S. E. 128. *Unlawful act: criminal carelessness.*

Where evidence tended to show that defendant carried a concealed weapon, which he handed to his co-defendant after removal of the magazine, and the co-defendant accidentally killed a boy with the cartridge in the barrel, the court is not justified in charging that the mere carrying of the weapon concealed was an unlawful act so as to make an unintended killing manslaughter aside from the question of criminal carelessness in failing to see that the gun was unloaded before handing it over for examination.

NON-SUPPORT OF CHILDREN.

State v. *Byron.* New Hamp. 104 Atl. 401. *Construction of statute requiring support of illegitimate children.*

The father of a bastard is not entitled to the custody or the services of the child, and is therefore not chargeable with his support, in the absence of statute or contract, giving the right or imposing the duty.

Where the father of a bastard child has not been ordered, in proceedings brought for that purpose, under Pub. St., 1901, c. 87, to pay for the support of the child he cannot be convicted, under Laws, 1913, c. 57, sec. 1, for willful neglect or refusal to support.

SELF-DEFENSE.

State v. *Agnesi,* New Jersey 104 Atl. 299.

Where accused, living apart from his wife and knowing that she and decedent were occupying the same apartment, bought a revolver and at 1 o'clock at night quietly entered the apartment through a window, which he pried open and roused deceased from sleep and shot him as he made a motion towards an axe, self-defense was not available to accused, since, under section 2 of the act concerning disorderly persons (2 Comp. St., 1910, p. 1927), he was such a person whom deceased had the right, under section 36 of the act (page 1937), to arrest without a warrant.

The rule is not that homicide is always reduced to "manslaughter" when a husband kills the paramour of his wife in the act of adultery, but only when the circumstances are such that the husband may be supposed to have acted in a sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice.

SELF-DEFENSE.

State v. *Jordan,* S. Car. 96 S. E. 221. *Misleading instruction: duty to retreat.*

In a prosecution for assault with intent to kill, the instruction, on self-defense, that "if you are not on your own premises, and are assaulted . . . you must run, if by running you will not probably increase your danger," that "when a man is on his own premises he does not have to flee," but "may stand his ground," and that if defendants were on their land, they did not have

to run, was misleading, since the words "retreat" and "retreating" were those proper to be employed, not meaning the same as "run" and "running."

TERM OF IMPRISONMENT.

Ex Parte Tanner, Calif. 175 Pac. 81. *Confinement in another state.*

Where escaped prisoner of one state, upon completion of a term of imprisonment in another state for another crime, was held by authorities of latter state upon request of authorities of former state pending arrival of officers to take him back to former state, the 6 months and 18 days he was so hold cannot be credited towards his uncompleted term.

TRIAL.

State v. *Ybarra,* N. Mex. 174 Pac. 212. *Effect of failing to permit accused to make statement before sentence imposed.*

In a capital case it is essential that defendant be asked by the court, before judgment is passed, whether he has anything to say why sentence of the court should not be pronounced upon him. And, where it does not affirmatively appear from the transcript of record that such inquiry was made of the defendant at the time of sentence, the judgment will be reversed; but a reversal on these grounds only affects the sentence and judgment and leaves the verdict and precedent proceedings in full force and effect.